BEFORE THE
COPYRIGHT ROYALTY TRIBUNAL

In the Matter of	)
	)
Distribution of Cable Royalty Fees	)

Memorandum of Broadcast Music, Inc.

Broadcast Music, Inc., by its attorneys, submits the following comments in response to the Copyright Royalty Tribunal's October 17, 1979, 44 Fed. Reg. 59930, request for legal briefs or memoranda concerning: (1) the issue of the broadcast day as a copyright compilation, (2) the issue of programming of which a broadcast station is an exclusive licensee, (3) the objections raised as to the standing of certain or all sports claimants and (4) any other question of copyright ownership as it affects a claim or right to any of the cable television royalties. These issues will be treated seriatim.

I. Compilation

It is unclear as to whether the broadcast day qualifies as a compilation subject to general copyright protection. Under the statute, a compilation "is a work formed by the collection and assembling of preexisting materials or of

data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. §101. The "materials" or "data" in a broadcast day may consist of advertisements, station identifications, and network, syndicated and locally-produced programming. Copyright protection does not attach merely to the collection of materials or data. A copyrightable "work" must embody authorship and originality. See generally, Nimmer on Copyright, §1.06. While locally-produced programs would appear to meet this test, for the entire broadcast day to qualify as a compilation, apart from any underlying copyrightable materials, there must be more than a minimal contribution. Thus, in order to qualify the broadcast day as a true compilation, it must be demonstrated that the originality involved in selecting and arranging programs is not so minimal that copyright protection does not attach.

It should be noted, however, that even if sufficient originality is demonstrated to warrant copyright protection, the protection extends only to the additional material contributed and not to the preexisting material. 17 U.S.C. §103(b). In particular, copyright does not extend to parts of the compilation separately copyrighted. For example, a broadcast compilation copyright would not extend to that

portion of the compilation which includes copyrighted musical works. Therefore, to the extent compilations claims are found to be valid, the amount of the royalty payment should reflect only the additional material contributed by the broadcaster.

II. Exclusive Licensing

Broadcasting interests also assert a right to royalty fees for the retransmission of programming for which they have obtained an exclusive license. The Act recognizes that copyright ownership may be transferred in whole or in part by exclusive license. See, §201(d)(1), §101, definition of "transfer of copyright ownership." Moreover, the exclusive rights comprised in a copyright may be transferred and owned separately. The Act specifically states that "the owner of a particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title." 17 U.S.C. §201(d)(2). The legislative history of the Section directly addressed its applicability to broadcasters:

> It is thus clear, for example, that a local broadcasting station holding an exclusive license to transmit a particular work within a particular geographic area and for a particular period of time, could sue, in its own name as copyright owner, someone who infringed that particular exclusive right.

H. R. Rep. No. 94-1476, 9th Cong. 2d Sess., 123 (1976).

It appears that the broadcaster obtains a copyright interest in programs for which it has obtained an exclusive license. To the extent, however, that the exclusive license is limited in geographical scope or duration, and the retransmission takes place outside of those limitations, the broadcaster would not appear to have a cognizable claim. Our understanding is that in exclusive programming arrangements the broadcaster normally obtains exclusive rights only for its local service area. It is questionable, therefore, whether a broadcaster's claims for retransmission of exclusively licensed works by distant cable systems, outside of its service area) would be valid.

III. Sports Telecasts

It would appear that the proper claimants for retransmission of live sports telecasts can be determined only after analysis of the arrangements involved in particular sports programming.

From a constitutional standpoint, copyright attaches to tangible writings and not to evanescent performances. Thus, a live television broadcast is not a writing and is therefore not per se eligible for federal copyright protection; nor is a performance or event, such as an athletic event, a writing subject to copyright protection. Nimmer on Copyright, §108(c).

Under the Copyright Act, copyright protection attaches to a live broadcast if it is simultaneously fixed in a tangible medium. 17 U.S.C. §101, definition of "fixed." Thus, although an athletic event is not itself a writing, the simultaneous recording of a live broadcast of the event effectively extends copyright protection to the event. The requirement for "authorship" of the writing is met by the contribution of the directors and cameramen in the transmission of live broadcasts. H.R. Rep. No. 2237, 89th Cong., 2d Sess. 44 (1966). See generally, Yeldell, Copyright and Live Sports Broadcasts, Fed. Comm. L.J., Vol. 31, No. 2, Spring, 1979. In accordance with basic copyright principles, it is the writing itself which obtains copyright protection. Nimmer, supra.

It would seem that the copyright owner is the producer of the writing, or the entity ultimately responsible for the production of the writing. To the extent that there are different contractual arrangements used in the sports programming field, involving variations in the rights and obligations of individual parties, the ownership of the copyright may vary. The proper claimant for retransmission royalty fees would seem to depend upon the contractual

arrangements involved. */ A definitive resolution of the matter will require evidence of actual marketplace conditions and the parties involved intimately with this issue should be encouraged to furnish the required data for the record.

IV. Other Issues

Notwithstanding the competing rights asserted in connection with copyright ownership of sports and other broadcast programming as described above, it is clear that the retransmission of musical compositions by cable television systems triggers copyright liability. In all instances, appropriate fixation exists and full statutory protection must be afforded. Furthermore, there exists no dispute that the proper copyright ownership of such musical compositions resides in the writers and publishers of such

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*/ This view is consistent with §501(c) which permits a television station, "holding a copyright or other license," to bring an infringement action for an illegal secondary transmission (including, presumably, sports telecasts) in its local service area. Similarly, §411(b) permits "the copyright owner" to obtain an injunction to prevent unauthorized retransmission of a live broadcast by instituting an action for infringement either before or after fixation. [Emphasis added].

creative work, whose interests are represented in these proceedings by Broadcast Music, Inc. and the other music licensing organizations.

Respectfully submitted,

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